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IN THE SUPREME COURT OF THE UNITED STATES

SPRING TERM, 1970

No. 1520

~~Misc.~~

MARGARET RUTH HORTON, PETITIONER

v.

STATE OF NORTH CAROLINA, Respondent

* *

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

* *

PETITION FOR WRIT OF CERTIORARI

* *

Margaret Ruth Horton

410 Upton Street
Winston-Salem, North Carolina

Margaret Ruth Horton
Petitioner
Per Se

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IN THE SUPREME COURT OF THE UNITED STATES

SPRING TERM, 1970

NO._____

Misc.

MARGARET RUTH HORTON, PETITIONER

v.

STATE OF NORTH CAROLINA, RESPONDENT

* *

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

* *

The petitioner, Margaret Ruth Horton, prays that a writ of certiorari issue to review the judgment of the Supreme Court of North Carolina entered July 28, 1969.

OPINION BELOW

The judgment was rendered at the October 1968 Criminal Session of Iredell County, which judgment upon appeal was affirmed by the North Carolina Court of Appeals and filled on June 18, 1969, being No. 6922SC147.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254.

QUESTIONS PRESENTED

1. Was it a violation of defendants rights for the Court to admit evidence against the defendant which was the product of an unconstitutional search and seizure, without securing defendants waiver to the introduction of such evidence, as under the Fourth and Fifth Amendments. Constitution of the United States.

2. Was it a violation of defendants rights to not be given notice prior to the Grand Jury Proceedings also suitable notice prior to the jury trial of October 21, 1968 and to be taken on capias instantly before the Honorable Walter E. Johnston on October 20, 1968 and to be held in custody while under good and sufficient bond also without counsel. As in Amendment 5, 6, and guarantee in Amendment 14. Notice, Confrontation, tri by jury, compulsory process for obtaining witnesses and aid of counsel. United States Constitution.

3. Was defendants rights violated when the indictment as found by the grand jury changed as in Amendment 5 - - Rights of Pers Constitution of the United States.

4. Was defendants rights violated when conviction is obtained by Perjured Testimony Amendment 14 - Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

AMENDMENT FOURTEEN.

AMENDMENT IV.

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons to be seized.

AMENDMENT V.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property, be taken for public use without just compensation.

AMENDMENT 5 - RIGHTS OF PERSONS

Apperson can be tried only upon the indictment as found by the grand jury, and especially upon its language found in the charging part of the instrument. A change in the indictment deprives the court of the power to try the accused.

STATEMENT

Your petitioner was indicted for the crime of conspiracy to commit murder, and same came on for trial at the 21st October, 1968 term of Superior Court; from a verdict of guilty as charged, petitioner appealed. In its opinion noted above the North Carolina Court of Appeals affirmed the conviction of petitioner.

"In January of 1967 defendant became acquainted with Robert Lee James (James) who is named co-conspirators in the indictment which charges that defendant with Robert Lee James and Carl Reuben Deal on the 6th day of May, 1967 and thereafter conspired to kill and murder one Lee Roy Horton. In late April of 1967 James and defendant rode around together and had a conversation which resulted in defendant telling James she wanted someone to do something to her husband. James asked defendant what she wanted and she said she wanted a little more than having her husband "beat or roughed up." James told defendant he knew a man who might do something like that and he was in New York. James and defendant drove back to Statesville and from a pay station James called Carl Deal (Deal) but left the impression with defendant that he was calling New York City. Thereafter James and defendant drove to the Charlotte Airport for the

purpose of meeting Deal, who was driving there from Taylorsville, but James and Deal implied that Deal was arriving on a plane from New York. James gave to Deal a .38 pistol with some bullets he had bought for it and introduced Deal to defendant as Joe Fratt. Defendant and Deal and James discussed the price for getting the job done and defendant paid $1,250.00 to Deal that night and agreed to pay him more the next night. They went to a farmhouse together which Deal was advised defendants husband frequented and where they could do the job. The next night defendant paid an additional $1,300.00 to Deal. James and Deal later scattered cigeratte butts around the upstairs window of the farmhouse and told defendant they had waited many hours for her husband who never arrived. Deal returned to Taylorsville and neither Deal nor James did any harm to defendants husband. Several days later defendant saw James and said,"You fellas took me, didn't you?" and demanded that James return her money; he did not return any money. Five or six months later there was a bombing in Statesville (the record does not show it to be related to this case) and after said bombing James and Deal talked to the police about their dealings with defendant.

The record explicitly shows that both James and Deal testified that at no time did they have any intention of killing or hurting defendants husband. The record also shows that defendant made a motion for nonsuit at the close of the States evidence which was overruled.

The Court of Appeals decision in effect disregards the rule of law that the State is bound by its own uncontradicted evidence. It is

settled law that if there is a conflict in the State's evidence then on motion for judgment of nonsuit it should be viewed in the light most favorable to the State, and forwarded to the jury to pass upon the conflict. However, in the instant case there was no conflict at all. The fact that money was received or that a gun was had or bullets purchased does not in any way conflict with the statements of Deal and James when they said they never intended to hurt defendants husband. Rather the above mentioned facts corroborate, since these articles were used as props in order to fool defendant and obtain her money. What the court did by overruling the motion for nonsuit was to allow the jury to conjecture that James and Deal "changed their tune" between the time alleged in the bill of indictment and five or six months later, rather than "infer from the evidence" that James and Deal had "changed their tune". The jury had nothing to consider because as a matter of law James and Deal spoke for the State, when there was no evidence to the contrary for the State; therefore the jury should not have been allowed to consider whether or not they were lying about not intending to hurt Horton since their veracity was not at issue. There was no evidence, circumstantial or direct which was contra to James and Deals statements. Accordingly, it was not a question for the jury and motion for nonsuit should have been allowed.

It was said in State v. Robinson, 229 N.C. 647, 50 S.E. 2d 740 (1948) "When--the

State's case is made to rest entirely on testimony favorable to defendant, and there is no evidence contra which does more than suggest a possibility of guilt or raise a conjecture, demurrer thereto should be sustained. State v. Todd, 222 N.C. 346, 23 S.E. 2d 47; State v. Watts, 224 N.C. 771, 32 S.E. 2d, 348; State v. Coffey, 228 N.C. 119, 44 S. E. 2d, 886.

"When the State offers evidence which tends to exculpate the defendant, he is entitled to whatever advantage the testimony affords and so, when it is wholly exculpatory, he is entitled to his acquital." See also North Carolina Evidence, Stansbury 2 Ed, 1963, Sec. 40, P. 80.

It is apparent that James and Deal's statements exculpated defendant; it is equally apparent that the statements of James and Deal was all of the evidence the State presented on this point.

Further, it is said in C.J.S. 15A, Conspiracy, Sec. 37, p. 731; "If one person only feigns acquiescense in a proposal of another to pursue an unlawful enterprise, there is no conspiracy, since there is no union or concert of wills." This is the exact situation here since James and Deal only feigned acquiescense in order to obtain defendant's money.

The Constitution of the United States in Amendment XIV prevents any state from depriving any person of his liberty without due process of law, and (also) requires equal protection of the law be extended to all persons. The Supreme Court in not applying

the rule that the State is bound by it's own uncontradicted evidence has deprived defendant of her liberty without due process. Also the Supreme Court, in not giving defendant the benefit of said rule failed to give to her equal protection under the law since said rule is well recognized as a part of the law of this state.

It was said in State v. Burton, 158 SE 2d 883 (1968) where Justice Branch quoted Justice Higgins as follows; "..There must be substantial evidence of all material elements of the offense to withstand a motion to dismiss. Substantial evidence of guilt is required before the Court can send a case to the jury." The Court quotes with approval from State v. Harvey, 228 N.C. 72, 44 SE 2d 472 where Chief Justice Stacy said; "True it is, the evidence seems to point an accusing finger at the defendant as the perpetrator of the crime, and to excite suspicion somewhat strongly perhaps of his guilt, but it apparently leaves to much to surmiss or assumption to support a conviction." The instant case compelled the jury to speculate as to whether or not James and Deal actually did agree and are now merely testifying that they didn't agree in order to save their hide. This is a matter of speculation and conjecture. The evidence is that they did not agree but only feigned agreement.

Likewise it is settled law that a judicial act is an act of State so as to come within the purview of the Fourteenth Amendment to the Federal Constitution. This was announced in the landmark case of Shelley v. Kraemer, 68 SC 836, here the United States Supreme Court said; "It has been the consistent ruling of

this Court that the actions of the states to which the amendment has reference, includes actions of state courts and state judicial officials." The provision in the Fourteenth Amendment against denial of due process to a litigant is made directly applicable to states' action in judicial proceedings as well as through other agencies of the State."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

Constitution of the United States:

AMENDMENT IV.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

AMENDMENT V.

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval

forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

JURISDICTION

The Jurisdiction of this Court is invoked under 28 U.S.A. (1254).

QUESTIONS PRESENTED

1. Was it a violation of defendants rights for the court to admit evidence which was the product of an unconstitutional search and seizure, without securing defendants waiver to the introduction of such evidence, as under the Fourth and Fifth Amendments to the Constitution of the United States.

2. Was it a denial of defendants rights under the Fifth Amendment of the Consitutiton of the United States for the Indictment as found by the grand jury changed.

3. Was defendants rights violated when conviction was obtained by purgered testimony.

4. Did the defendant have her rights violated when the Supreme Court of North Carolina didn't apply the rule that the State is bound by its own uncontradicted evidence, also the Constitution of the United States prevents any state from depriving any person of his liberty without due process of law.

1. Security "in their persons, houses, papers, and effect" is assured to the people by this article. There is no evidence there was a search warrant for photographs taken in the farmhouse. Boyd v. United States 116 U.S. 616. The seizure of a mans private papers to be used in evidence against him is equivalent to

compelling him to be a witness against himself and in a prosecution for a crime, penalty or forfeiture, is equally within the Fifth Amendment. The Fifth Amendment declares that no person "shall be compelled to be a witness against himself." 267 U.S. 148 In Silverthorne Lumber Company v. United States 251 U.S. 385 a writ of error was brought to reverse a judgment of contempt of the District Court, fining the company and imprisoning one Silverthorne, its President, untill he should purger himself of contempt in not producing books and documents of the company before the grand jury to prove violation of the statutes of the United States by the Company and Silverthorne. Silverthorne had been arrested and while under arrest the marshal had gone to the office of the company without a warrant and taken books, papers and had taken copies and photographs of the papers. This was held to be an unreasonable search of the property and possessions of corporation and the judgment for contempt was reversed.

2. Amendment 5 under the Constitution of the United States -- Rights of Persons -- A person can be tried only upon the indictment as found by the grand jury, and especially upon the changing part of the instrument. A change in the indictment deprives the court of the power to try the accused. Exparte Bain, 121 U.S. 1.12 (1887). When the indictment is filed with the court no change can be made in the body of the instrument

by order of the court, or by the prosecuting Attorney and the fact that the court may deem the change immaterial, as striking out of surplus words makes no difference. The instrument as thus changed is no longer the indictment of the grand jury which presented it. A trial on such an indictment is void. There is nothing to try (in the language of the constitution) which the prisoner "can be held" to answer. According to principals long settled in this court the prisoner who stands sentenced to the pententiary on such trial is entitled to his discharge. Mr. Justis Yates said that an endictment being upon oath cannot be amended. 121 U.S. 8. The People v. Campbell 121 U.S. 9-10. The great importance which the common law attaches to an indictment by a grand jury as a prerequisite to a prisoners trial for a crime and without which the constitution says "no person shall be held to answer" may be frit-away until its value is almost destroyed. State v. Sexton 121 U.S. 8-9.

3. The due process clause of the Fourteenth Amendment governs any action of a state through its legislature, its Courts, or its executive officers, including action through its prosecuting officers. A criminal conviction procured by the State Prosecuting authorities solely by perjured testimony known by them to be purjured and knowingly used

by them in order to procure the conviction, is without due process of law and in violation of the Fourteenth Amendment. When a conviction is obtained by the presentation of testimony known to be purjured, the constitutional requirement of due process is not satisfied. That requirement "cannot be deemed to be satisfied by mere notice and hearing if a State has contrieved a conviction through a pretense of a trial which in truth is used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be purjured. Mooney v. Holahan, 294 U.S. 103, 112 (1935). There were no cigeratte butts on the floor or around the windows in the photographs taken of the interior of the old farmhouse. The State maintains the States Witnessess, James and Deal purjured themselves.

4. If the witnessess did not purge themselves the State is bound by its own uncontradicted evidence, as in the Fourteenth Amendment. It was said in State v. Robinson, 229 N.C. 647, 50 S.E. 2d 740 (1948) "When the States case is made to rest entirely on testimony favorable to the defendant, and there is no evidence contra which does more than suggest a possibility of guilt or raise a conjecture, demurrer thereto should be sustained.

State v. Todd, 22 N.C. 346, 23 S.E. 2d 47; State v. Watts, 224 N.C. 119, 44 S.E. 2d, 886.

5. Amendments Five and Six (notice and confrontation, trial by jury, compulsory process, of obtaining witnessess, and aid of counsel. The Court has relied upon this provision in holding that an accused shall plea, or be ordered to plea, or a plea of not guilty be entered for him before his trial proceeds, and in ruling that if the accused is in custody he must be personally present at every stage of the trial where his substantial rights may be effected by the proceedings against him. It is not within the power of the accused or his Attorney to waive such right. When the Constitution requires a hearing it requires a fair one ---- An opportunity must be given not only to present evidence, but also to know the claims of the opposing party and to meet them.

REASONS FOR GRANTING OF THIS WRIT

This Writ should be granted because the North Carolina Supreme Courts decision is in conflict with all States. Likewise the Constitution of the United States prevents any State from depriving any person of his liberty without due process of law, and requires equal

protection of the law to all persons.

CONCLUSION

Defendant feels there is proper cause for review of this case and believes there are reasonable grounds for reversal upon such review.

Therefore this Petition for Writ of Certiorari is respectfully submitted and defendant prays that a Writ of Certiorari issue that this court might review the instant case.

Margaret Ruth Horton
Petitioner
Per Se

Margaret Ruth Horton
410 Upton Street
Winston-Salem, North Carolina

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Appendix To Petition

~~United States Court Of Appeals~~

No. 6922SC147

State Of North Carolina,

Appellee,

versus

Margaret Ruth Horton,

Appellant

Appeal from the North Carolina State Supreme Court at Raleigh.

Decided November 19, 1969.

Defendant assigns as error the denial of her motions for judgment as of nonsuit and contends that she was denied due process and equal protection of the laws when the Court of Appeals failed to apply the rule that the State is bound by its uncontradicted evidence.

In State v. Gallimore, 272 NC 528, 158 SE 2d 505, this Court defined a conspiracy as follows: "A conspiracy is the unlawful concurrence of two or more persons in a wicked scheme the combination or agreement to do an unlawful thing or to do a lawful thing in an unlawful way by unlawful means. (Citing many cases)' State v Goldberg, 261 NC 181, 134 SE 2d 334: State v. McCullough, 244 NC 11, 92 SE 2d 389. A conspiracy to commit a felony is a felony. State v. Brewer, 258 NC 533, 129 SE 2d 262: State v. Abernethy, 220 NC 226, 17 SE 2d 25. The crime is complete when the agreement is made. State v. Davenport, 227 NC 475, 42 SE 2d 686: State v. Whiteside, 204 NC 710, 169 SE 711; State v. Knotts, 168 NC 173, 83 SE 972. Many jurisdictions follow the rule that one overt act must be committed before the conspiracy becomes criminal. Our rule does not require an overt act.

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Since our rule does not require an overt act, an attempted withdrawal by one of the conspirators before an overt act in furtherance of the agreement will not prevent a verdict of guilty of conspiracy. 16 Am. Jur. 2d, Conspiracy, Sec. 29, at 142. Nor is it necessary for the purpose of the conspiracy to be accomplished in order for a verdict of guilty to stand. Goldman v. United States, 245 US 474, 52 L. ed. 410. There can be no conspiracy unless there is a union of wills, and if only one person feigns acquiescence in a proposal of another to pursue an unlawful enterprise, there is no conspiracy. One person cannot conspire with himself. State v. Tom, 13 NC 569; 15 C.J.S., Conspiracy, § 37, p. 730. However, if three or more conspire to commit a crime, the fact that there is a union of purpose between only two will not bar a prosecution and conviction of the two. 15A C.J.S., Conspiracy, § 37, p. 730. The unsupported testimony of a co-conspirator is sufficient to sustain a verdict, although the jury should receive and act upon such testimony with caution. State v. Tilley, 239 NC 245, 79 SE 2d 473.

The rule relating to sufficiency of evidence to carry a case to the jury is concisely stated in the case of State v. Stephens, 244 NC 380, 93, SE 2d 431. We quote therefrom:

If there be any evidence tending to prove the fact in issue or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury.' The above is another way of saying there must be substantial evidence of all material elements of the offense to withstand the motion to dismiss. It is immaterial whether the substantial evidence is circumstantial or direct, or both. To hold that the court must grant a motion to dismis unless, in the opinion of the court, the evidence excludes every reasonably hypothesis of innocence would in effect constitute the presiding judge the trier of the facts. Substantial evidence of guilt is required before the court can send the case to the jury. Proof of guilt beyond a reasonable doubt is required before the jury can convict. What is substantial evidence is a question of law for the court.

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What that evidence proves or fails to prove is a question of fact for the jury. S. v. Simpson, ante, 325; S. v. Duncan, ante, 374; S. v. Simmons, supra; S. v. Grainger, 238 NC 739, 78 SE 2d 769; S. v. Fulk, 232 NC 118, 59 SE 2d 617; S. v. Frye, 229 NC 581, 50 SE 2d 895; S. v. Strickland, 229 NC 201, 49 SE 2d 469; S.v. Minton 228 NC 518,46SE 2d 296; S. v. Coffey, 228 NC 119, 44 SE 2d 886; S. v. Harvey, 228 NC 62, 44 SE 2d 472; S. v. Ewing, 227 NC 535, 42 SE 2d 676; S. v. Stewinter, 211 NC 278, 189 SE 868; S.v. Johnson, supra."

In the instant case the decision must stand or fall upon the testimony of two alleged co-conspirators who, in the course of their testimony when offered as State's witnesses, testified as to the circumstances surrounding the alleged conspiracy, and in their further testimony stated that they never intended to harm defendant's husband. Defendant contends that the State, offering them as its witnesses and worthy of belief, has made out a complete defense entitling defendant to nonsuit. The State, on the other hand, contends that the testimony of the alleged co-conspirators shows such circumstances and conduct as to carry the question of defendant's guilt to the jury.

It is well established in this jurisdiction that a party cannot introduce testimony to impeach or discredit the character of his witness, and when in a criminal action a complete defense is established by the States's evidence, a defendant may avail himself of such defence by a motion for judgment as of nonsuit. Yet, if the witness testifies to facts against the State's contentions, the State is not precluded from showing the facts to be other than as testified to by the witness. State v. Jarrell, 233 NC 741, 65 SE 2d 304; State v. Todd, 222 NC 346, 23 SE 2d 47; State v. Cohoon, 206 NC 388, 174 SE 91; Smith v. R. R., 147 NC 603, 61 SE575. It is equally well established that when the substantive evidence offered by the State is conflicting-some tending to inculpate and some tending to exculpate the defendant- it is sufficient

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to overrule a motion for judgment as of nonsuit. State v. Litchum, 258 NC 397, 128 SE 2d 665; State v. Bass, 255 NC 42, 120 SE 2d 580; State v. Vaughn, 249 NC 329, 96 SE 2d 39; State v. Tolbert, 240 NC 445, 82 SE 2d 201.

It must be borne in mind that the State offered no evidence to impeach the testimony of its witnesses except for questions as to the past record of the witness James, which were asked and answered without objection. The State vouched that witnesses were worthy of belief as to all of their testimony, and where there was contradiction in the testimony, it was for the jury to believe all the testimony or to believe a part, and reject a part, or to to reject it all, because it is the trier of the facts, Brown v. Brown, 244 NC 485, 141 SE 2d 875; State v. Vaughn, Supra; State v. Henderson, 130 NC 735, 105 SE 599; State v. Ellis, 97 NC 447, 28E 525; State v. Overton, 75 NC 200.

In the case of Smith v. R. R., supra, we find the following:

"While it is accepted doctrine that one who offers a witness 'presents him as worthy of belief, and except, perhaps, where an examination is required by the law, as in the cases of subscribing witnesses to wills and deeds... a party will now be allowed to disparage the character or impeach the veracity of his own witness, nor to ask questions or offer evidence which has only these purposes in view, it is always open to a litigant to show that the facts are otherwise than as testified to by his witness..... And this he may do, not only by the testimony of other witnesses, but from other statements of the same witness, and at times by the facts and attending circumstances of the occurrence itself, the res gestae." (Emphasis ours)

The above was quoted with approval in the case of State v. Cohoon, supra. See also Worth Co. v. Feed Co., 172 NC 335, 90 SE 295.

Defendant relies on the case of Odneal v. State, 117 Tex. Cr. App. 97, 34 SW 2d 595, where

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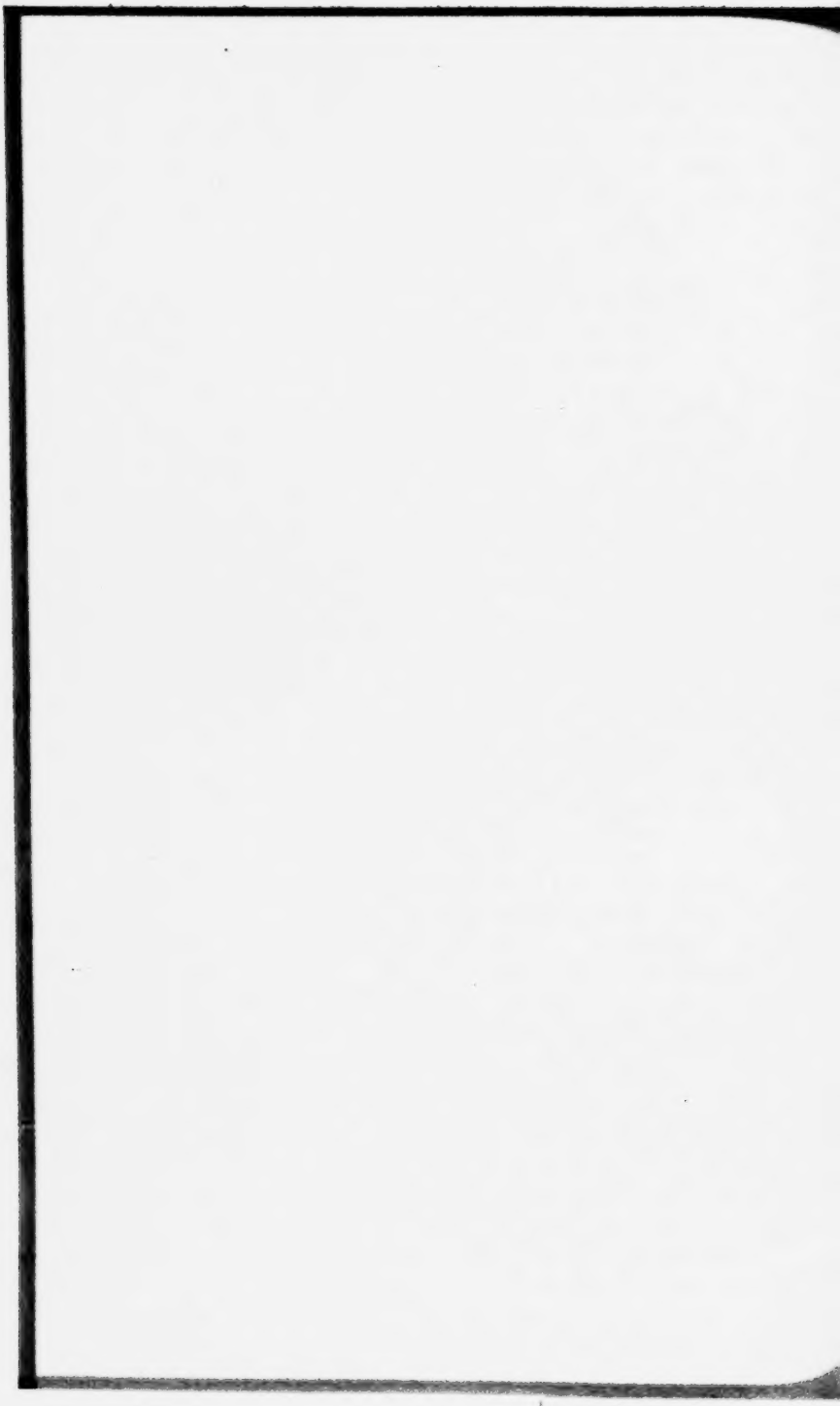

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an accomplice testified on direct examination that he had entered into a conspiracy with the defendant and testified on cross-examination that he never intended to carry out the agreement. The court submitted this case to the jury to decide whether the witness intended to carry out the conspiracy.

Ddfendant contends that Odneal v. State, supra is distinguishable from the instant case because here witnesses only testified as to what they were paid to do on direct examination, and testified on cross-examination that they never intended to do it. The fallscy in defendant's argument is that a criminal conspiracy may be established by circumstantial evidence from which the conspiracy may be legitimately inferred. State v. Butler, 26, NC 733, 153 SE 2d 477. The validity of the type of evidence here relied upon by defendant recognized in the case of State v. Whiteside, 204 NC 710, 169 SE 711. There, the defendants Whiteside and Cannon pleaded not guilty. The State offered evidence which tended to show that defendant Whiteside was caught in the act of robbing the theatre, together with evidence that defendants had been acquainted for over a year and had "bummed" their way into Asheville on a train; that they both spent the night at the Salvation Army and on the next day saw State's witness McDuffie. McDuffie testified that Cannon asked him if the Imperial was a good place to rob. Whiteside testified that Cannon had nothing to do with the robbery and that he did not even know Cannon. He further testified that State's witness McDuffie suggested to him that the Imperial Theatre was a good place to rob and that he (McDuffie) would help commit the robbery. The jury returned a verdict of guilty as to Cannon, who appealed. This Court, in holding that there was sufficient evidence to overrule defendant's motion as of nonsuit, stated:

Direct proof of the charge (conspiracy) is not essential, for such is rarely obtainable, It may be, and generally is, established by a number of indefinite acts, each of which, stand-

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ing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy. S. v. Wrenn, supra. When resorted to by adroit and crafty persons, the presence of a common design often becomes exceedingly difficuly to detect. Indeed, the more skillful and cunning the accused, the less plainly defined are the badges which usually denote their real purpose. Under such conditions, the results accomplished, the divergence of those results from the course which would ordinarily be expected, the situation of the parties and their antecedent relations to each other, together with the surrounding circumstances, and the inferences legitimately deducible therefrom, furnish, in the absence of direct proof, and often in the teeth of positive testimony to the contrary, ample ground for concluding that a conspiracy exists, 5 RCL, 1088.

So, in the instant case, notwithstanding the positive testimony of Whiteside to the contrary, and the rather 'broken reed' upon which the State is compelled to rely, we think the evidence is sufficient to carry the case to the jury. Its credibility was for the twelve."

Thus, the situation of the parties and their relations to each other, together with the surrounding circumstances and the inferences deducibly therefrom, may furnish ample proof of conspiracy even in the face of positive testimony to the contrary.

Defendant also contends that the case of Woodworth v. The State, 20 Tes. Cr. App., 375, supports her position. There, the witness Hunt testified that he intended to trap defendant Woodworth in the act of committing a burglary. He agreed with Hunt on a specific time when he would help him commit the burglary, but as soon as the plan was made Hunt dispatched a note advising the Sheriff of the plan so that he could be on hand at the proper time and place and make the arrest. The Sheriff testified that he received the note and acted accordingly. This case is clearly distinguishably from the instant case because there the surrounding circumstances and the testimony of the witnesses, with-

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out contradiction or conflicting inferences, showed no unity of purpose to commit an unlawful act.

Defendant seriously argues that in addition to the statement of the alleged co-conspirators that they did not intend to harm her husband, certain acts, such as giving Deal a false identity and the scattering of cigarette butts in the farmhouse to make it appear that they had lain in wait for her husband, tended to negate any union of purpose to do an unlawful act. In this connection the witness James, referring to Deal testified: "He is a friend of mine and he is from out of town. I wanted to get somebody she didn't know... If it was someone around here that would kill him, she might have known about it," The witness' interest in further concealing the identity of a friend about to be asked to engage in an unlawful act is understandably. The other acts which defendant contends tend to negate the alleged conspiracy cannot be related to the night that James agreed to obtain someone to do "a little more than beat up or rough up" defendant's husband. One of the strongest indications of an unlawful agreement is found in the testimony of the witness Deal. Deal testified that after the telephone call from James (which must have been during the third meeting between James and defendant and in defendant's presence). James came to his home in Taylorsville and at that time stated to him that "He knew a old gal in Statesville that we could get a little piece of money out of, and said that she wanted to get something done to her husband, and he said that she wanted to go further than roughing him up, and I said that I wouldn't do anything like that." This testimony permits a strong inference that up until the very moment that Deal refused to go along with the plan to murder defendant's husband. Without attempting to review all of the indicia of conspiracy found in th State's rbifinvr, er noyr yhsy $2550 in cash was accepted by James and Deal from defendant, and James explained the purpose of the payment by testifying,"I received the money for doing just what

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we were talking abour, to kill him," The testimony here referred to and the other facts found in the State's evidence are all colored by a delay of several months before either of the alleged co-conspirators talked with the police. Surely, without the statement of the alleged co-conspirators that they never intended to harm defendant's husband, there was sufficient evidence to raise an inference of intent to form a conspiracy between James and defendant - and probably between defendant, James and Deal. The denial of intent by both of the alleged conspirators created a conflict in the State's evidence which, upon a consideration of the evidence in a light most favorable to the State, presented a question for the jury.

The decision of the Court of Appeals is

Affirmed

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1520 Misc.

MARGARET RUTH HORTON,

Petitioner,

v

STATE OF NORTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINION BELOW

This case was originally tried in the Superior Court of Iredell County, North Carolina, which is a court of general jurisdiction, at the October 21, 1968 Term. The petitioner was tried on an indictment charging conspiracy to commit murder and upon her plea of not guilty, she was tried by a jury, found guilty, and received a sentence of imprisonment for seven to ten years.

On appeal, the North Carolina Court of Appeals found no error. The case is reported as STATE v HORTON, 5 N. C. App. 141, 161 S. E. 2d 871 (1969).

The North Carolina Supreme Court granted certiorari to review the decision of the North Carolina Court of Appeals and upon consideration of the case, affirmed the decision of the North Carolina Court of Appeals. The case is reported as STATE v HORTON, 275 N. C. 651, ... S. E. 2d .... (1969).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C.A. Section 1254.

QUESTIONS PRESENTED

(1) WAS DEFENDANT DEPRIVED OF CONSTITUTIONAL RIGHTS IN CONNECTION WITH ANY SEARCH AND SEIZURE?

(2) WERE THE DEFENDANT'S CONSTITUTIONAL RIGHTS PROTECTED IN BEING HELD IN CUSTODY WITHOUT COUNSEL?

NOTE: The defendant includes in her list of questions certain issues regarding an alleged change in the bill of indictment and a statement regarding alleged perjured testimony. The record is devoid of evidence of either of these circumstances and these issues will therefore not be treated by the State.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

While the State of North Carolina does not agree, the petitioner contends that the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States are involved.

Since the defendant was charged with the common law offense of consipracy, no statutes are involved.

STATEMENT

This is in response to a petition for writ of certiorari to review the judgment of the Supreme Court of North Carolina filed 19 November 1969, affirming petitioner's sentence of imprisonment for 7 to 10 years for conspiracy to murder her estranged husband.

The indictment alleges that defendant Horton consipired with Robert Lee James and Carl Deal to murder Lee Roy Horton. James and Deal were not indicted, and both testified for the State.

James' testimony shows: That he knew defendant in January 1967; that in April, 1967, she came to his home in Statesville at 9:00 o'clock one night. Defendant gave him a note bearing her telephone number. He called her the next day and arranged to meet defendant on the Charlotte Highway about 8-9 o'clock that night. They went to a farm house owned by the defendant, and she told James that her husband was a fireman in Statesville; that she was having trouble with him. They arranged to meet the next night.

During the next day, James went to the restaurant where defendant worked and talked with her and they met that night. Defendant asked James if he knew someone that he could get to do something to her husband (R pp 4-5).

James said " 'Well, I don't know. What do you want to get done to him? Do you want him beat up or roughed up or what do you want?' She said, 'I want a little more than that.' I said, 'I don't know, I might know a man who might could do something like that for you.' She said, 'What do you think it would cost me?' I said, 'I have no idea. I can contact the man by phone and see if we can get him down here. I have to get him from New York.' I said, 'Would you like for me to contact him,' and she said, 'Yes.' " (R p 5)

James then made a phone call while defendant could hear what was said. The call was to Carl Deal in Taylorsville (R pp 5-6).

Deal indicated he was interested in making some money, and James told defendant that the man from New York would be at the Charlotte Airport on Wednesday night.

On Wednesday, defendant met James on the Charlotte Highway and drove him to Charlotte in her car. After telling

defendant that he would have to get some .38 bullets for a .38 pistol, because Deal wanted him to bring them, they stopped in Charlotte and James purchased the bullets (R p 6).

Defendant and James went on to the Charlotte airport, but Deal did not appear. They went back to Statesville and returned to the Charlotte airport the next night. James met Deal in the airport, told him everything was set, and bought Deal a pair of sunglasses. He gave Deal the .38 pistol while in the airport, then they went to the car where defendant was waiting.

Deal was introduced by James to defendant as Joe Fratt. They started back to Statesville and defendant stopped at a service station and purchased a flashlight (R p 7).

Defendant asked Deal (Fratt) what he was going to charge for the job, and he said Five Thousand Dollars (R p 7). She wanted to know if that would take care of James' part and how they wanted the money. Defendant gave Deal one-half of his part that night and the rest the next night, making a total of $2,500 (R pp 7-9).

On the trip from the airport to the farmhouse, Deal asked for the bullets, broke down the pistol and put the bullets in the gun so defendant could see him (R p 7).

They went to the farmhouse owned by defendant and located an upstairs window where they could see defendant's husband when he came to the farmhouse in the morning or late afternoon, as was his custom (R pp 7-8).

Defendant gave James some pictures of her husband that night at the farmhouse, and had given James some pictures of him prior to that night, and had described her husband to him. (R p 8).

James kept the pictures in the glove compartment of his car for 5-6 months, until he gave them to the officers (R p 8).

The first $1,200 was given to Deal at the farmhouse.

James and Deal were supposed to wait at the farmhouse, but he drove Deal back to Taylorsville. The next day James and Deal went to the farmhouse, and put cigarettes around the window in the room. They again met defendant at the rear of a furniture building, where she gave Deal $1,300 more, and he told her they were going to the farmhouse that night because the man was going through with what he was supposed to do and had to leave (R p 10).

James called defendant the next day and told her that her husband did not show up that night; that Fratt (Deal) had to leave town, but would be back within a few days to do the job (R p 10).

James then had Deal to call defendant and pretend he was a "trusty" at the Raleigh jail, and that he was calling for Joe Fratt who was being held for carrying a concealed weapon, and for her to come to Raleigh to get Fratt out on bond (R p. 10).

Defendant later contacted James and he met her at the farmhouse; defendant told James "You fellows took me didn't you?"

James said " 'What do you mean?' She said, 'You know what I mean. You took Twenty-Five Hundred Dollars off me.' I said, 'Well, I don't know what you are talking about.' She said, 'I want you to write me a check for twenty-five hundred dollars.' I refused to write the check and she said well let's go to Raleigh and see about Mr. Fratt. I said, 'No, I'm not going anywhere. I'm through with it right now.' She had a big handbag and opened it and put her hand inside. I took the pistol out of my pocket and told her to drop the bag. I said, 'Mrs. Horton, I do not want to hear anymore about this. If I do, I am going to go and tell your husband what you are trying to do.' She said, 'You wouldn't dare.' " (R p 11)

When James called Deal, he told him she wanted to get her husband killed (R pp 11-12).

On cross-examination, James testified that he contacted

Deal because he wanted to get somebody defendant didn't know, because if it was somebody around here that would kill him, defendant might know about it (R p 13).

James further stated on cross-examination that he and Deal never intended to kill defendant's husband; that they were interested in getting the money from defendant (R pp 13-14). But on page 14 of the record, James testified that he, Deal and defendant never agreed to kill her husband, "in that many words, no," but on the first conversation with James (R p 5) that she wanted more done than "beating him up"; James "pictured in my mind what she wanted. She must want something a little more than that to pay $2,500" (R p 14); that he received the money for doing just what we were talking about, to kill him (R p 14).

James then testified that it was on the third night that he and defendant went to the farmhouse that she wanted to know if he could get someone to do something to her husband, and he agreed to get someone in touch with her, and that nothing was said that night about money, but when the subject of money was brought up, he never agreed to hurt her husband, but only to put her in touch with someone.

After James heard about defendant's husband being bombed, he went to Mr. Zeb Morris and talked to the local police (R p 16).

The testimony of Carl Deal, a State's witness, was largely corroborative of James' testimony, as to their contact with defendant, the receipt of the money from defendant, and that he didn't intend to harm defendant's husband.

State's witness, Lt. Clyde Lloyd, testified on cross-examination that James and Deal told him about their agreement with the defendant; that they told him they never intended to harm defendant's husband; and that he was satisfied that was the truth (R p 25).

Defendant offered no evidence.

ARGUMENT

The Respondent has already noted above that two issues raised by the defendant are completely without factual support in the Record, *i.e.*, defendant's allegations that the bill of indictment was altered and that the testimony of State's witnesses was perjured.

Likewise, the other questions which defendant presents are without factual basis. There is no evidence of which defendant could claim constitutional right against illegal search and seizure. And defendant had competent private counsel from her arrest. The Record is devoid of any evidence of an in-custody confession or confrontation for identification purposes for which absence of counsel could be important. Certainly, there is no evidence that defendant was deprived of counsel and, when retained, defendant employed them.

CONCLUSION

The Respondent respectfully requests that the petition for a Writ of Certiorari be denied.

Respectfully submitted,

ROBERT MORGAN
Attorney General of North Carolina

(Mrs.) CHRISTINE Y. DENSON
Staff Attorney

RICHARD N. LEAGUE
Staff Attorney

Counsel for the State of North Carolina,
Respondent

Justice Building
P. O. Box 629
Raleigh, North Carolina 27602

Telephone (919) 829-3328

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ROBERT SEAVER,

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

NO. 1520

MARGARET RUTH HORTON

PETITIONER

v.

STATE OF NORTH CAROLINA

RESPONDENT

****

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE STATE OF NORTH CAROLINA

****

PETITION FOR REHEARING PETITION FOR WRIT OF CERTIORARI

****

MARGARET RUTH HORTON
PETITIONER PRO SE
410 UPTON STREET
WINSTON SALEM, N.C.
TELEPHONE 765-2053

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM,

No. 1520 Misc.

MARGARET RUTH HORTON

Petitioner

v.

STATE OF NORTH CAROLINA

Respondent

****

PETITION FOR REHEARING
PETITION FOR WRIT OF CERTIORARI

****

The petitioner, Margaret Ruth Horton, prays that a rehearing for petition for writ of certiorari issue to review the judgement of the Supreme Court of North Carolina entered in the above case on November 19, 1969.

OPINION BELOW

This case was originally tried in the Superior Court of Iredell County, North Carolina, which is a court of general jurisdiction, at the October 21, 1968 Term. The petitioner was tried on an indictment charging conspiracy to commit murder and upon her plea of not guilty she was tried by a jury, found guilty, and received a sentence of imprisonment for seven to ten years.

On appeal, the North Carolina Court of Appeals found no error. The case is

reported as State v. Horton, 5 N.C. App. 141, 161 S.E. 2d 871 (1969).

The North Carolina Supreme Court granted certiorari to review the decision of the North Carolina Court of Appeals and upon consideration of the case affirmed the decision of the North Carolina Court of Appeals. The case is reported as State v. Horton, 275 N.C. 651, S.E. 2d (1969).

The United States Supreme Court denied Petition for Writ of Certiorari, on appeal to the United States Supreme Court for petition for Writ of Certiorari. The case is reported as No. 1520 Misc.

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C.A. 1254 (1).

QUESTIONS PRESENTED

1. Was defendant deprived of due process because of insufficiency of the indictment?

2. Was defendant deprived of constitutional rights when she was not allowed a hearing before the final order?

3. Was defendant deprived of federal due process when she was convicted of a crime with no evidence to support the conviction?

4. Was it error to overrule defendants motion for judgment as of nonsuit when all the States evidence tended to prove no union of purpose among the alleged co-conspirotors and the defendant?

5. Did the North Carolina State Supreme Court deny to defendant due process of law and equal protection of law as guaranteed by the U.S. Constitution when it failed to apply the rule the State is

bound by its own uncontradicted evidence?

6. Was defendant deprived of constitutional rights when evidence which was the product of an unconstitutional search and seizure without securing defendants waiver to the introduction of such evidence, used in the trial?

7. Was the use of perjured testimony a denial of defendants constitutional rights?

8. Did pretrail publicity effect the defendants right to fair trial?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

AMENDMENT IV.

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

AMENDMENT V.

No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice be put in jeopardy of life or limb; nor to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be

taken for public use without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury, of the State and district wherein the crime shall have been previously ascertained by law, and to be informed of and to be informed of the nature and cause of the accusation.

AMENDMENT XIV

—Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of its laws.

STATEMENT

Petitioner was indicted for conspiracy with Deal and James to murder her husband. At the trial both James and Deal testified that they never intended to harm defendants husband. All their acts were done to obtain money from Mrs. Horton and lead her to believe that they were interested in killing her husband, according to James and Deal. Defendant made a motion for nonsuit which was overruled. Defendant put on no evidence and the case was submitted to the jury on the apparent theory that the jury could believe James and Deal as to the agreement but disbelieve them when they said they did not intend to harm the defendants husband, even though there was no conflicting evidence on this point.

REASONS FOR GRANTING THIS WRIT

Constitutional provisions requiring that indictment (indictment R P 1) inform defendant of nature and cause of accusation cannot be qualified or amended by statute or decisions (18 U.S.C.A.) (paragraph 556; Consti. Amends. 5,6). Indictment must state all material facts and circumstances embraced in definition of offense, and omission of any essential element cannot be supplied by intendment or implication. (18 U.S.C.A. paragraph 556). In the instant case the indictment did not contain elements of the offense intended to be charged and sufficiently appraise the defendant of what she must be prepared to meet. The nature and cause of the accusation must be set out through an indictment by the grand jury as guaranteed in the Fifth Amendment. Neither statutes nor decisions was or were intended to qualify or amend, or could they qualify, amend, or set aside these provisions of the constitution. As was well said in the case of State V. Van Pelt, 136 N.C. 633, 49 S.E. 177, 180, 68 L.R.A. 760, 1 Ann. Cas. 495 (A Conspiracy Case): " No offense is so easily charged and so difficult to be met unless the defendants are fully informed of the facts upon which the state will rely to sustain the indictment. While technical objections to indictments are not to be sustained, substantive and sub-substantial facts should be alleged. General and undefined charges of crime, especially those involving mental conditions and conditions and attitudes should not be encouraged. They are not in harmony with the genius of a free people, living under a written Constitution." As stated in Pettibone v. United States, 148 U.S. 197: " The general rule in reference to an indictment is that all the material facts and circumstances embraced in the definition of the offense must be stated, and that, if any essential element of the crime is omited, such omision cannot be supplied by intended or implication. The charge must be made directly, and not in fementially, or by way of recital".

Pettibone v. United States, 148 U.S. 197 at page 202, 13 S.Ct. 542, 545, 37 L.Ed. 419 Citing United States v. Hess, 124 U.S. 483 486, 8S. Ct. 571, 31 L. Ed. 508. The charge must be made directly and not inferentially or by way of recital".

In the case of United States v. Cruikshank, 92 U.S. 542, 558, 23 L.Ed 588, after re-iterating the constitutional right of the accuse to be informed of the nature and cause of the accusation, the court quoted with approval the cases of United States v. Mills, 7 Pet. 142 8L. Ed. 636,and United States v. Cook, 17 Wall, 174, 21 L. Ed. 538, to the effect that the indictment must set forth the offense "with clearness and all necessary certainty, to appraise the accused of the crime with which he stands charged", and that "every ingredient of which the offense is composed must be accurately and clearly alleged", and that is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species; it must descend to particulars". Citing 1 Arch. Cr. Pl. and Pr. 291. And for this reason, " the facts are to be stated, not conclusions of law alone. In United States v. Britton, 108 U.S. 199 2S. Ct. 531, 2L Ed 698. It follows as was said in that case, that the conspiracy itself must be sufficiently charged, and cannot be aided by averments of acts don by one or more of the conspirators in furtherance of the object of the conspiracy. The mere setting forth of the means intended to be used or that were used cannot be taken inferentially to support an indictment for conspiracy unless and untill the essential elements of the unlawful agreement and purpose have been fully and clearly set forth".

In C.J.P. 543 paragraph 5 2. See also 12 C.J. pp. 614, 615, and 616. When the charge is laid the terms of the agreement must be set forth therein, and untill this is done, evidence of the conduct of the parties cannot be held to be competent or responsive to the unalleged agreement. In the instant case

petitioners counsel did not object to the insufficientcy of the indictment, although petitioner objected to her counsel.

In Henry v. Mississippi 379, U.S. 443, 1965 it was established that a defendant will not be precluded from asserting constitutional claims merely because of failure of counsel to observe the contemporaneous-objection rule.

In Brookhart v. Janis, 304 U.S. 1 (1966). It was held that the accused ina criminal action could not be deemed to have waived his rights. The court thus held that there must be a waiver in the constitutional sense, "an intentional relinquishment or abandonment of a known right or privilege, "Johnson v. Zerbst, 304 U.S. 458, 464 (1938) and that this waiver must be made by the defendant personally and not by counsel acting in his behalf without consulting with the defendant and obtaining the defendants informed consent, before a fundamental constitutional right can be regarded as having been lost for failure to make a timely technical gesture.

Petitioner did not have a preliminary hearing before the jury trial. Defendant was brought to trial on an indictment, no warrant having ever been issued. (RP 4) Amendment 5 " When the Constitution requires a hearing it requires a fair one---An opportunity must be given not only to present evidence, but also to know the claims of the opposing party and to meet them. Morgan v. United States, 304 U.S. 1, 18-19 (1938). See also Gonzales v. United States, 348 U.S. 407, 417-418 1955 wherein it was held that procedural fairness requires that a conscientious objector, in contesting his draft classification before the appeals board, be furnished with a copy of the recommendation submitted by the Dept. of Justice; for only by being apprised of the arguments and conclusions upon which the Departments recommendations were based will he be enabled to present his case effectively to the Appeals Board.

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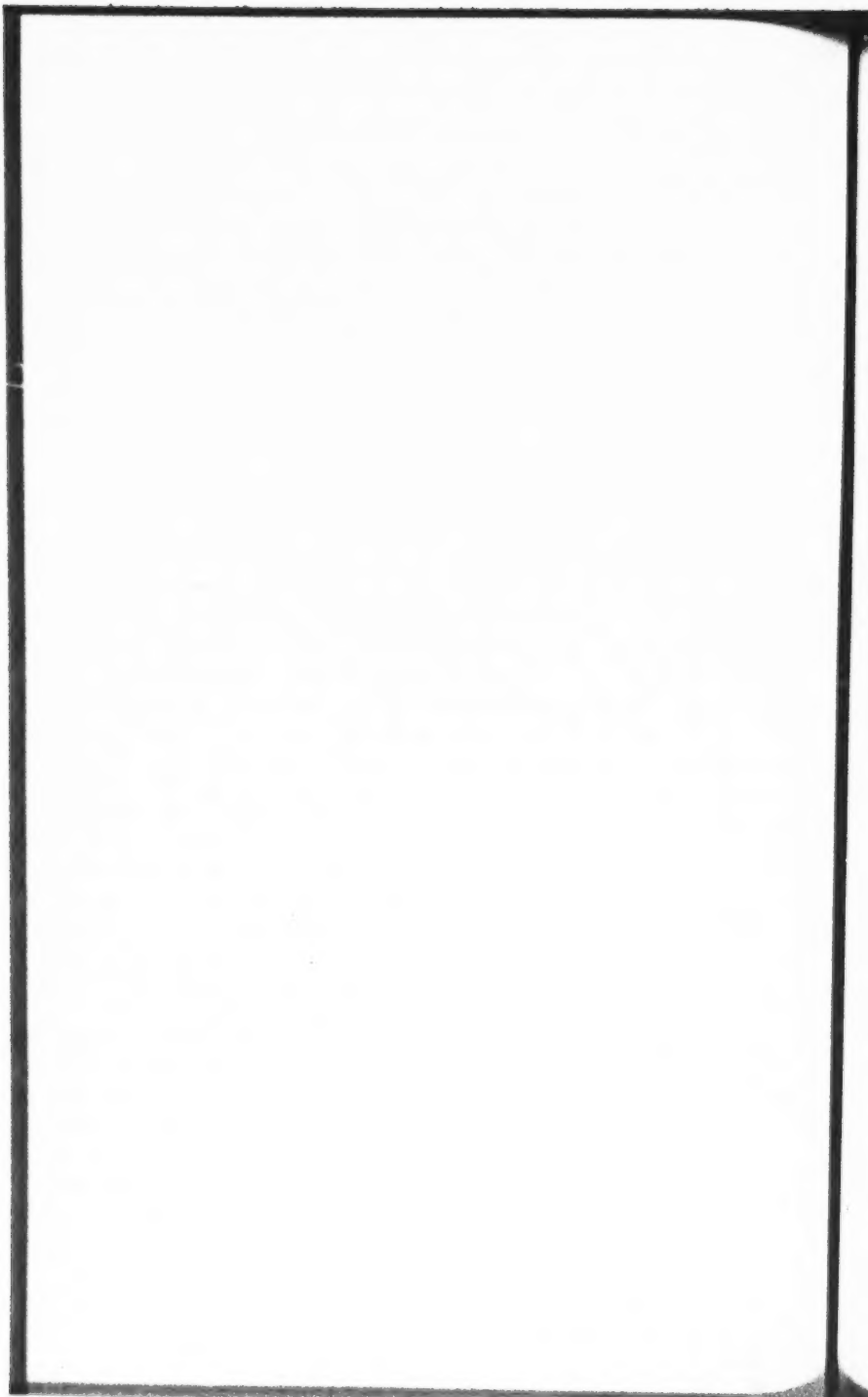
Petitioner never had any notice that the grand jury was going to meet concerning her case. In a prosecution for a felony, five justices declared "the defendant must have the privilege under the Fourteenth Amendment to be present in his own person whenever his presense has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge. Snyder v. Massachusetts, 291 U.S. 97 (1934) Ibid 105, 106 107, 108, 118. "It--was not a matter of assumption but a certainty that the--privelege of the accused to be present throughout his trial is of the very essence of due process

3. It was 1960 that the United States Supreme Court held that to convict of crime with no evidence to support the conviction constituted a denial of due process. United States ex rel. Caminato v. Murphy (1955) CA 2 N.Y. 222 F2d 698 Certden 350 U.S. 936, 100 L ed 708, 76 S.Ct. 155, in which the court said that to jail a man convicted without evidence of guilt is to impose involuntary servitude which, except as punishment for crime, the Thirteenth Amendment to the Federal Constitution forbids. See also Thompson v. Louisville (1960) 362 U.S. 199 4 L ed 2d 654 80 S Ct 624, 80 ALR 2d 1355,---defendant was convicted of two offenses, loitering and disorderly conduct. "if the evidence fails to prove all three elements of this loitering charge the conviction is not supported by evidence, in which event it does not comport with due process of law." In the instant case (R 15) James "never intended to kill anybody" and Deal "never intended to kill anybody" also (R 25) were only interested in getting money from Mrs. Horton." Indictment (R 27) did conspire in combination agreement and union of purpose of mind with Robert Lee James, Carl Rueben Deal---. Mr. Clyde Lloyd testified (R 25) " James told me he never intended to harm Lee Roy Horton. I am satisfied that this is the truth. Deal told me that he never intended to harm Lee Roy Horton. I am satisfied that this is the truth". Mr. Andy Williams

testified (R. 24) he had in his possessions a record of a long distance call placed from Petitioners number to Raliegh Wake County Jail on May 6, 1967, There is no evidence in the record that there was record of such a long distance call placed on exhibit as the photographs were (R. 17).

There is no evidence in the record that there was a pistol (R. 17) placed on exhibit during the trial. There is no evidence in the record that there was any money (R. 23) placed on exhibit during the trial.

4-5. The record explicitly shows that both James and Deal testified that no time did they have any intention of killing or harming defendants husband. The record also shows that defendant made motion for nonsuit at the close of the States evidence which was overruled (R. 26). Defendant offerred no evidence and at the close of all the evidence, defendant renewed her motion for judgment as of nonsuit (R. 26). It is apparent that James and Deals testimony exculpated defendant. It is equally apparant that Mr. Clyde Lloyd (police detective) (R. 24) vouched for James and Deals testimony, that they never intended to harm defendants husband. The Appelate Courts in North Carolina in refusing to apply the evidentiary rule that the State is bound by its own uncontradicted evidence has deprived defendant of her liberty without due process. The motion for nonsuit by defendant, at the end of States evidence should have been granted because the prosecution has not make a case in that the evidence raised no issue of fact that required jury action. In reaching a decision to direct a verdict the judge must consider the evidence in the light most favorable to the defendant. The facts brought out by admissable and substantial evidence and all proper inferences therefrom conside ing all the evidence in the light most favorable to the defendant and ignoring all evidence to the contrary did not establish a legal case. By substantial evidence is meant more than enough to give



rise to, a conjecture, a surmise, a suspicion not entirely unreasonable and not opposed to physical law.

6.There was no search warrant for the photographs taken inside the farmhouse(R. 42) exhibits #6 and seven identified as interior of farmhouse. The records do not show any evidence that there was a search warrant: In Johnson v. Zerbst, 304 U.S. 458, 464 (1938) ---waiver must be made by the defendant personally and not by counsel acting in his behalf without consulting the defendant and obtaining the defendants informed consent and consulting the defendant, before a fundamental constitutional right can be regarded as having been lost for failure to make a timely technical gesture. In the present case petitioners counsel did not object to the introduction of the photographs. The record is barren of any showing that petitioners counsel deliberately failed to object to the admission of this exhibit for purposes of trial strategy. The record can only suggest inadvertence, neglect, or ignorance as explanations for failing to make efforts to exclude this evidence. There is no indication that petitoner personally understood that she might be losing her right to challenge this evidence, and certainly there is no indication that petitioner purposely gave up her right to complain that by admiting said evidence the state compelled Petitioner to be a witness against herself. In Boyd v. United States 116 U.S. 616. The seizure of a mans private papers to be used in evidence against him is equivalent to compelling him to be a witness against himself. Silverthorne Lumber Company v. United States 251 U.S. 385. Silverthorne had been arrested and while under arrest the marshal had gone to the office of the company without a warrant and taken books, papers and copies of photographs of the papers. This was held to be an unconstitutional search of the property and possessions of corporation and the judgment for contempt was reversed. See also Lamp v. Ohio (1961) 376 U.S. 643 6L ed 2d 1081, 81

S Cten 684, ALR 2d 933, reh den 360 U.S. 871, 71 ed 2d 72, 82s Ct 23. In Byers v. United States 273 U.S. 28 (1927).

7.The United States Supreme Court had said that the prohibition of the knowing use of false testimony to obtain a conviction is "implicit in any concept of ordered liberty," Napue v. Illinois (1959) 260 U.S. 264, 3L ed 2d 1217, 79 S Ct 1173. James testimony (R. 4) "that he became acquainted with defendant in January 1967 where she worked as a waitress at Womacks Restaurant". And also that it was in April 1967 that he "went to Womacks Restaurant, where defendant was working and made arrangements to meet that evening".(R. 5). This testimony was perjured. Appended to petition is affidavit. On direct examination (not in red bound certified record but in original transcript after the jury was empaneled and the first of States evidence) Mr. Arthur Beckham testified that petitioner came out of court house after custody proceedings and made threatening statesments to her husband. This was perjured testimony. (Affidavit appended hereto.) On redirect examination Mr. Arthur Beckham testified (R. 10) on redirect that petitioner saw he and petitioners husband in front of court house in the late part of October and made threatening remarks to her husband. This was perjured. (Affidavit appended hereto). Mr. Beckham testified (R. 10) that in the latter part of February petitioner called him by phone. This was perjured testimony.(And in the original transcript, not in the red bound book). (The original transcript is in the United States Supreme Court--taken there by petitioners daughters). At the end of Mr. Beckhams testimony on redirect examination Mr. Beckham testified the records for custody proceedings when the three children were awarded to petitioners husband, were at the Statesville police dept. This perjured testimony was also prejudicial towards defendant. See affidavit appended to petition.

Mr. Jack Zimmerman (PP 25) testified "he saw James take two pictures from the glove compartment of his thunderbird car in the early part of December 1967 and gave to the policeman. The man in the pictures was Lee Roy Horton". This was perjured. Affidavit appended to petiton.

James testified (P. 8) petitioner described her husband as a big man, weighing about 200 lbs. and 6 ft. tall. Petitioners husband weighed about 150 lbs. and was 5 ft. 8 in. Affidavit appended to petition. Meriting attention is Curran v. Delaware (1958) CA 3 Del. 259 F 2d 707, Certden 358 U.S. 940 3 L ed2d 353, 79 S St 355, in which it appeared that a state police officer testifing for the state in a prosecution for rape, swore "plainly positivly and unequivocally" that " the statements of defendant submitted as state exhibits were the only signed statements given by him to the police." The court pointing out that the highest court of the state had asserted that the record left no doubt that the police officers testifed was untrue, said that, although the state court did not characterize the testimony as perjurous" there can be no doubt that its conclusion was to that effect. In Curran v. Delaware (1958, CA 3 Del 259 F 2d 707, Cerden 358 U.S. 940. 3 L ed 2d 353 79 S Ct 355, The court of Appeals rejected, as had the District Court, the argument that the risk of perjured testimony must be run,--knowledge on the part of the police officers who testified for the state was held to sufficient to cause defendants trial to "pass the line of tolerable imperfection and fall into the field of fundamental unfairness." Thus the United States Supreme Court in Hague v. Illinois (1959) 360 U.S. 264, 3 L ed 2d 1217, 79 S Ct 1173, lent its support to the view that the fact that the prosecution is lacking in guile or a desire to work prejudice is of little importance where the impact of the perjured testimony is such as to prevent a trial that can in any sense be termed fair.

the controlling principal was said to be that the United States Supreme Court has a duty to make its own independant examination of the record when Federal Constitutional derivations are alleged.

The testimony of police and other law enforcement officers should be subject to scrutiny. There is no guarantee that law enforcement officers always tell the truth or particularly the full truth. The pressure to make an arrest and prosecute in answer to public demandfor action can influence testimony. Enforcement officers have some degree of professional interest in the successful prosecution of accused persons. The testimony (R. 10) James put cigarette butts around the windows inside the room of the farm house and in the middle of the floor was perjured. There was no cigarette butts around the windows inside the room of the farm house and in the middle of the room in the photographs taken of the interior of the farmhouse. The photographs are in the United States Supreme Court. Also affadavit appended to petition. S.B.I. Agent Ray Garland and police Detective Clyde Lloyd took these photographs, allowing them to be introduced as evidence, knowing it to be perjured testimony.

8. Petitioners Counsel did not know the trial was set for Oct. 23, 1968 untill Oct. 22, 1968 at 12 O'clock noon at which time he sent a message to petitioner to be in his office at 5:30 p.m. Oct. 22, 1968. At five-thirty, petitioners counsel told petitioner the trial was going to be the next morning at 9:30 a.m., Oct. 23, 1968, and for petitioner to stay out of town and not to go into the courtroom because he had to be in court in another county and had already told the prosecution and the Judge. Petitioner followed the advice of he counsel and was picked up on capias and taken before the judge about 4:30 Oct. 23, 1968. At which time she was ordered put in jail and kept there untill after the trial. The news was especially fiery all that day on the radio every hour. The law officials went to petitioners bondsmen and threatened to take their property

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Delaney v. United States (1952) CAI 199 F 2d 107, 39 ALR 2d 1300, infra paragraph 12 (a) it was held, despite the defendants failure to move for a change of venue or to exhaust his peremptory challenges, that the denial of his motion for a continuance constituted reversible error. Juelich v. United States (1954) CA 5 Ga. 214 F2d 950 there had been extensive pretrial publicity in the local newspapers and in radio and television broadcast. For example, prior to the defendants arrest he was referred to as an outlaw, desperado, killer, and murderer, and the court held reversing the defendants conviction, that the trial judge should have either sustained the motion for a change of venue or granted a continuance for such period of time as might be necessary to insure that a fair and impartial jury could be obtained. Petitioners counsel had continually told petitioner that the prosecution never intended to go to trial because they said they did not have evidence that would stand up in court. Petitioners councel had also told petitioner since the prosecution didn't want to go to court or to trial there was no need for petitioner to do anything about preparing a defense. Sheppard v. Maxwell 384 U.S. 333 (1966) Clark, 8-1. In the months before the trial the community was subject to a barrage of newspaper stories and editorials accusing him of the crime and pointing to damaging evidense that was never later introduced at the trial denied the defendant his right to an impartial jury, as guaranteed by the 6th Amendment as made applicable to the States by the fourteenth Amendment. (153-4) In the instant case petitioner did ask petitioners counsel for a change of venue and an out of county jury. To petitioners knowledge her counsel did not ask for an out of county jury or a change of venue. Although petitioners counsel did exhaust his peremptory challenges.

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CONCLUSION

For the reason set forth above, it is respectfully that this petition for rehearing be granted.

Petitioner sincerely believes there is reason for reversal.

Margaret Ruth Horton
Per Se

Margaret Ruth Horton
Per Se
410 Upton Street
Winston Salem, N.C.
Telephone 765-2053

LOSE TO EDGE

Certificate

The foregoing petition for rehearing is presented in good faith and not for delay and I further certify that the petition is restricted to the ground specified in Rule 58 (2) of the rules of the court.

APPENDIX TO PETITION

MARGARET RUTH HORTON

PETIONER

v.

STATE OF NORTH CAROLINA

RESPONDENT

****

PER DURIAM:

Defendant assigns as error the denial of her motions for judgment as of nonsuit and contends that she was denied due process and equal protection of the laws when the Court of Appeals failed to apply the rule that the State is bound by its own uncontradicted evidence.

In State v. Gallimore, 272 N.C. 520, 158 S.E. 2d 505, this Court defined a conspiracy as follows:

"A conspiracy is the unlawful concurrance of two or more persons in a wicked scheme--the combination or agreement to do an unlawful thing or do a lawful thing in an unlawful way by unlawful means. (Citing many cases) State v. Goldberg, 261 N.C. 161 134 SE 2d 334; State v. McCullough, 244 N.C. 11 92 SE 2d 389. A conspiracy to commit a felony is a felony. State v. Brewer 253 N.C. 533.

Since our rule does not require an overt act in furtherance of the agreement will not prevent a verdict of guilty. There can be no conspiracy unless there is a union of will, and if only one person feigns acquiescence in a proposal of another to pursue an unlawful enterprise, there is no conspiracy. One person cannot conspire with himself. However, if three or more conspires to commit a crime, the fact that there is a union of purpose between only two will not bar a prosecution and conviction of two. The

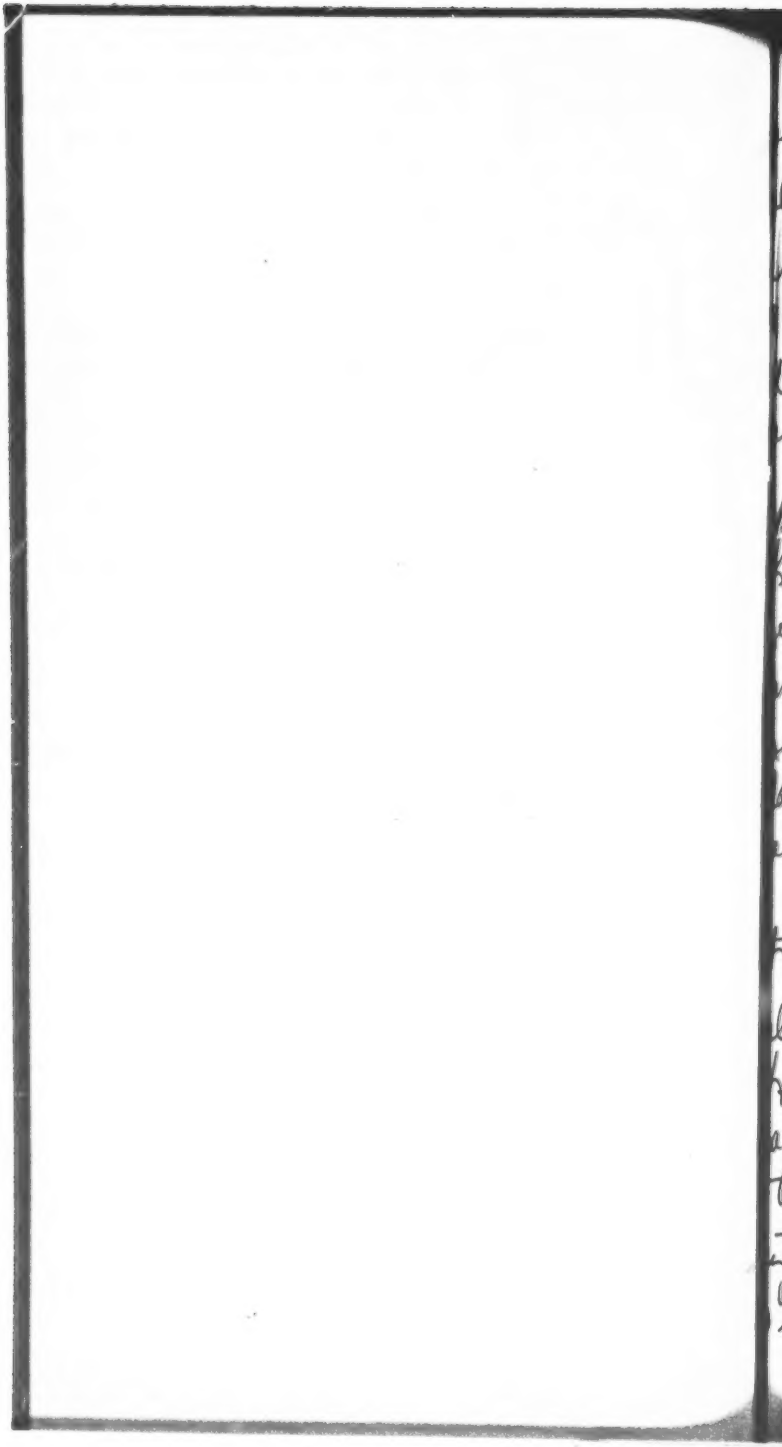
unsupported testimony of a co-conspirator is sufficient to sustain a verdict, although the jury should receive and act upon such testimony with caution.

In the instant case the decision must stand or fall upon the testimony of two alleged co-conspirators who, in the course of their testimony when offered as State's witnesses, etc.

Surely without the statement of the alleged co-conspirators that they never intended to harm defendant's husband, there was sufficient evidence to raise an inference of intent to form a conspiracy between James and defendant and probably between defendant, James and Deal. The denial of intent by both of the alleged conspirators created a conflict in the State's evidence which, upon a consideration of the evidence in a light most favorable to the State, presented a question for the jury.

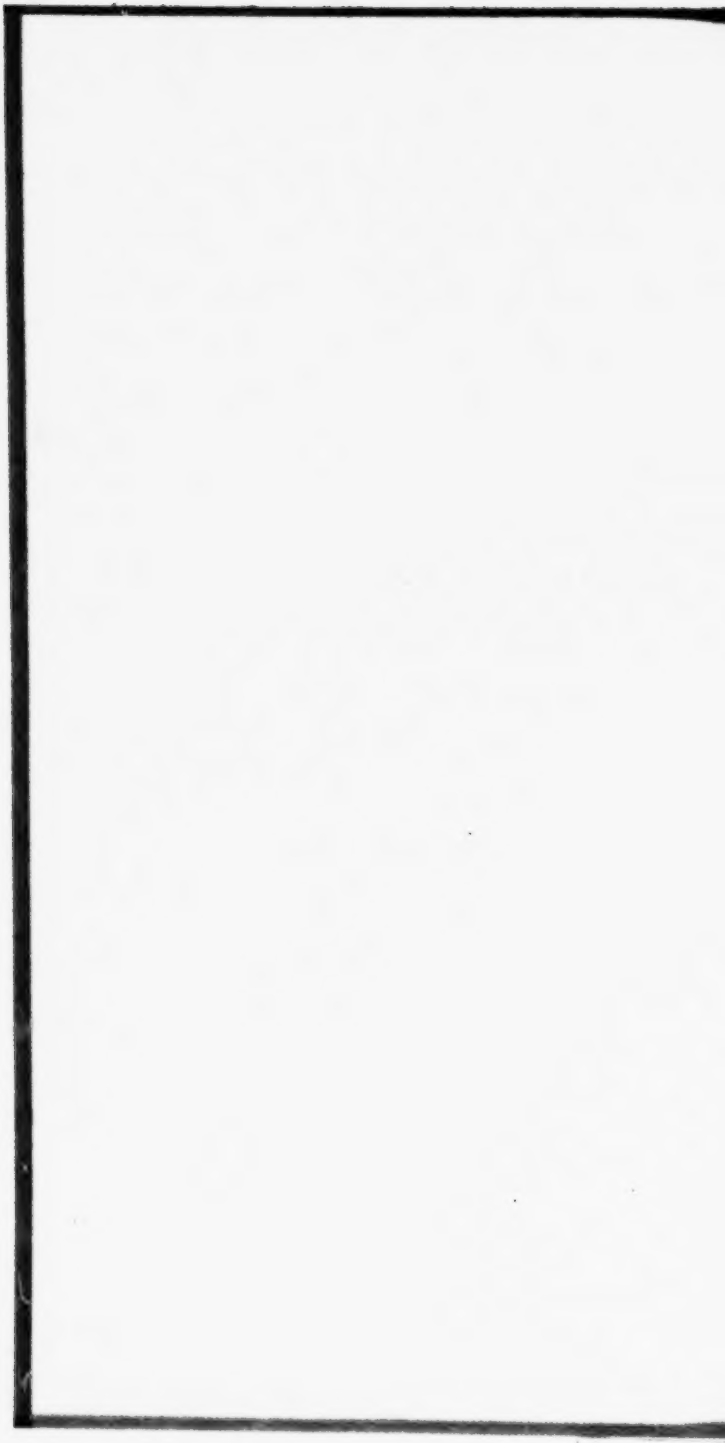
The decision of the Court of Appeals is

AFFIRMED.



Before Mother's trial for
nspiracy was held she kept my
ly for me while I worked. I
me in from work on October 22,
68, and she told me that her
ttorney had called and wanted
r to be in his office at 5:30.
prepared dinner for her to go.
en she get back about 9:30 p.m
told me Mr. Carlton told
, that her trial was to be
e next morning at 9:30. He also
d her to stay out of town the
xt day, October 23, 1968, and not
go into the court room. Until
at day October 23, 1968 Mr.
lton had told Mother, everytime
e saw him, that the prosecution
d said they never intended to go
trial because they didn't have
thing (evidence) that would stand
in a trial.

Margaret Messick



During the years of 1966 and
7 when Mr. Arthur Beckham said
at my mother, (Margaret Ruth Horton)
de threatening remarks to him
out my stepfather, I was living
th my Mother. To my
owledge Mother never saw Mr.
kham outside the courtroom.

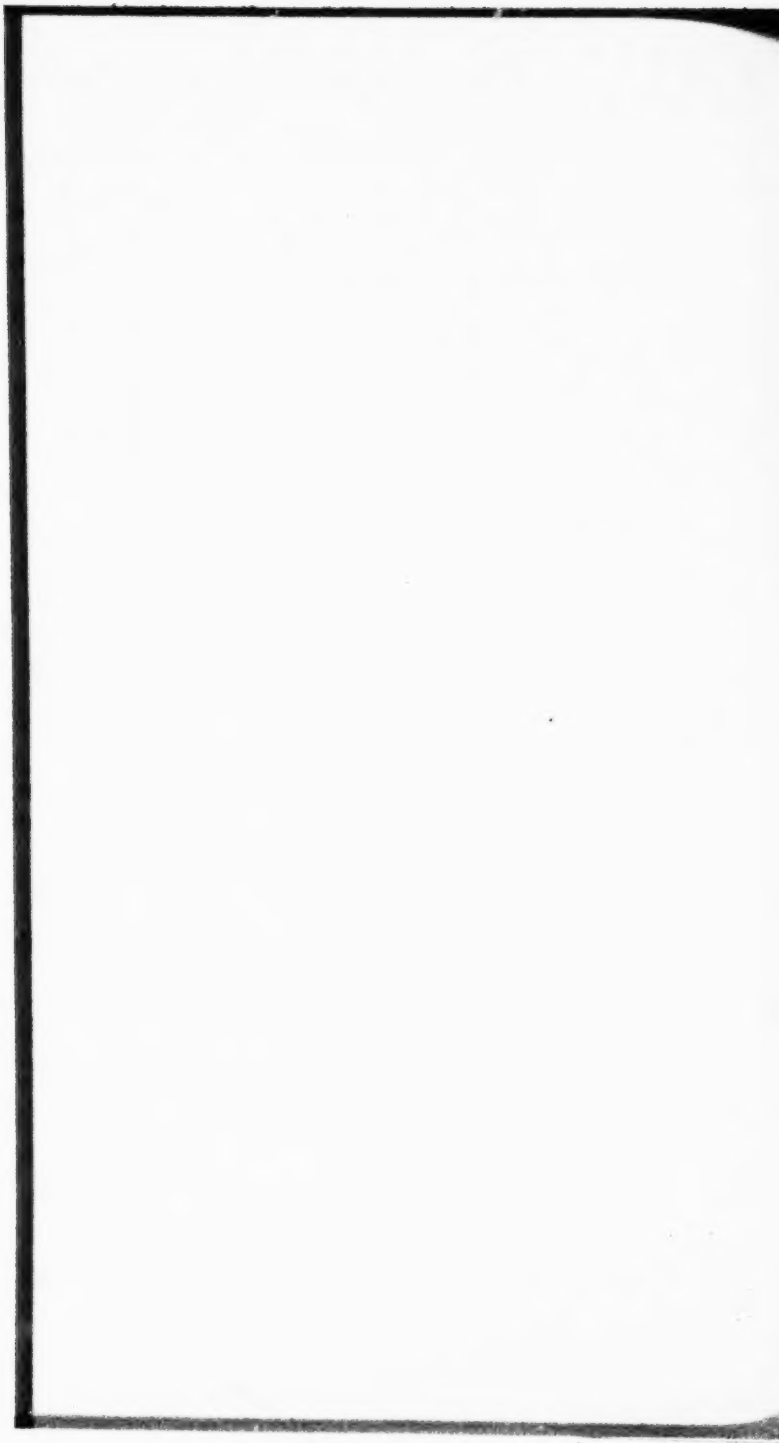
Margaret Messick

NORTH CAROLINA
FORSYTH COUNTY

This is to certify that Margaret Messick personally appeared before me this 8th day of July 1970 and swears that the above statement is true.

Rebecca N. Pierce
Notary Public

My commission expires November 13, 1970.



When the custody hearing was held for my three little brothers between my mother and step-father, my stepfather left the court room first. Then my sister, neighbors, and mother left the court room through a side door, and went straight home. My mother did not see my stepfather outside the court-room.

There was no court reporter in the court room during the custody hearing.

My mother, Margaret Ruth Burton, did not work at Nomads Restaurant any time during 1967.

Carolyn Warren

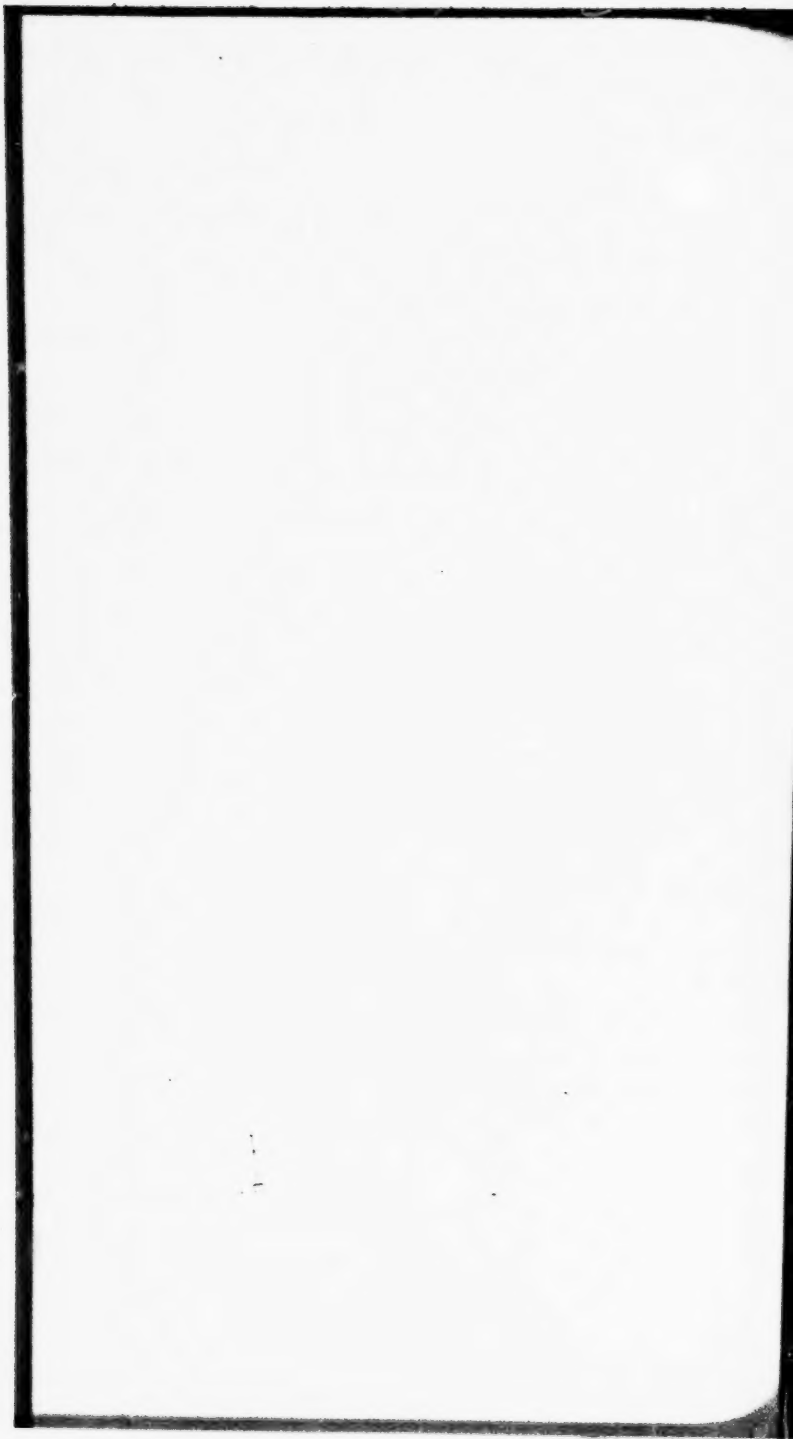
Carolyn Warren

This is to certify that Carolyn Warren appeared personally before me this 7th day of July and swears that the above statement is true.

7-7-70

Notary Public

My commission expires March 28, 1971



saw the pictures of my
t Mr. James said my mother gave
e while I was living with my father.
ey were in his locker at the fire depar
nt. Then sometime after my father's
th my uncle and a fireman went in
father's trunk looking for pictures and
n they found a bunch of pictures
uncle (Richard Horton) closed the trunk
d he and I took the trunk with conten
the police department. Then Richard
t me in one room and he went in
other and closed the door. In a little
ile Mr. Lloyd came out and showed me
picture of my mother and father and
ed me if that was my mother.

Leeroy Horton

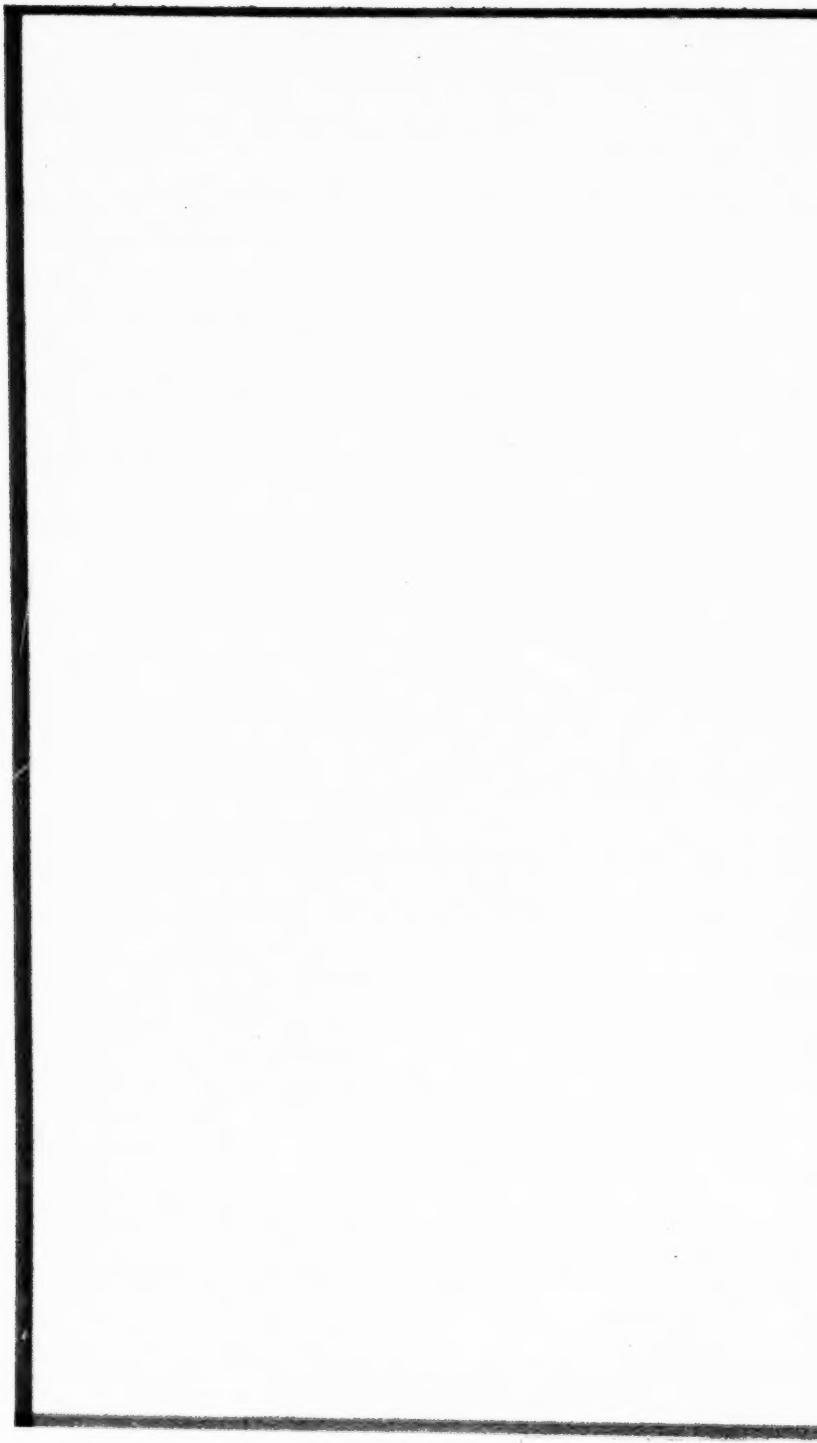
This is to certify that Leeroy Horton personally appeared before me this 7th day of July and swears that the above statement is true.

7-7-70

Notary Public

My commission expires March 28, 1971

My commission expires



Statesville Bookkeeping & Secretarial Service

P. O. BOX ~~1823~~ 5382 -:- PHONE TRiangle 3-3077

Statesville, N. C.

This is to certify that Statesville Bookkeeping Service kept the books for Womack's Restaurant during 1967, and according to our payroll records, Mrs. Margaret Ruth Horton did not woek there during April and May 1967.

W. T. Weeks

W. T. Weeks, Owner

This is to state that I was one of several persons on the bond of
Margaret Ruth Horton, and that on October 21, 1918

This is to state that I was one of several persons on the bond of Margaret Ruth Horton, and that on October 23, 1968, the day she was supposed to appear for trial, that she ~~was~~ acting on the advise of her lawyer failed to appear as he would be out of town on another case. When Mrs. Horton failed to appear, a deputy visited me trying to locate Mrs. Horton. I asked him if my part of the bond was forteited, and he told me that "as of now it was, but he said we might get the lawyer to work something out."

Mrs. Dorothy M. Williams

Mrs. Dorothy M. Williams

This is to certify that Mrs. Dorothy M. Williams personally appeared before me this 6th day of July and swears that the above statement is true.

William T. Weeks
Notary Public
Iredell County

My commission expires 2-9-71

The pictures that Mr. James said that my mother gave to him, which were presented at the trial were the same ones that I saw at the fire station in my fathers trunk. Daddy, my brother and I were going through his trunk looking for some things and we saw them. I was living with my father then.

Dean Horton
Dean Horton

This is to certify that Dean Horton appeared personally before me this 7th day of July and swears that the above statement is true.

Rebecca N. Pierce
Notary Public

My commission expires **November 13, 1970.**

After my mother's trial for conspiracy and she was out of jail on bond, my two brothers and I went out to the old farm house. We went upstairs and saw the room that was photographed by the police for the trial. There were photograph flash bulbs lying around on the floor. Also, there were only two cigarette butts on the floor and none in the windows. There were no cigarette butts in the photographs that were presented at the trial.

Leeroy Horton

This is to certify that Leeroy Horton appeared personally befor me this 7th day of July and swears that the above statement is true.

7-7-70

Notary Public

My commission expires My commission expires March 28, 1971

After my mother's trial for conspiracy, and she was out of jail on bond, my two brothers and I went out to the old farm house. We went upstairs and saw the room that was photographed by the police for the trial. There were photograph flash bulbs lying around on the floor. Also, there were only two cigarette butts on the floor and none in the windows. There were no cigarette butts in the photographs that were presented at the trial.

Dean Horton

This is to certify that Dean Horton appeared personally before me this 7th day of July and swears that the above statement is true.

Rebecca N. Purnell
Notary Public

My commission expires November 13, 1970